Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SHAREEF COUSIN,
Petitioner,

v.

BYRON BERRY AND ROGER JORDAN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held – in conflict with *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), and contrary to the decisions of this Court in *Buckley v. Fitzsimmons*, 509 U.S. 529 (1993), and *Kalina v. Fletcher*, 522 U.S. 118 (1997) – that county prosecutors were acting as advocates and were thus entitled to absolute immunity when they allegedly coerced and fabricated false witness testimony, detained defense witnesses to prevent them from testifying at trial, and failed to provide obviously exculpatory material to the defense prior to trial, all as part of an alleged effort to ensure that an innocent person would be convicted of capital murder.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Shareef Cousin was the appellant below. Byron Berry and Roger Jordan, assistant district attorneys for Orleans Parish, and Harry Connick, individually and in his capacity as District Attorney for Orleans Parish, were appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Shareef Cousin respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 325 F.3d 627 and is reprinted at Pet. App. 1a-20a. The opinion of the district court is unreported and is reprinted at Pet. App. 21a-39a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 24, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves 42 U.S.C. §§ 1983, 1985. These provisions are reproduced at Pet. App. 43a-45a.

STATEMENT OF THE CASE

The Fifth Circuit below granted absolute immunity to respondents Byron Berry and Roger Jordan, assistant district attorneys from Orleans Parish in Louisiana, for their alleged role in a coordinated effort to ensure the conviction of an innocent person for capital murder. In order to secure a conviction, respondents are alleged to have coerced false testimony and fabricated evidence, issued illegal subpoenas to coerce and intimidate potential witnesses, detained

defense witnesses to prevent them from testifying, and engaged in the wholesale, unconstitutional suppression of obviously exculpatory evidence. As a result of these efforts, petitioner Shareef Cousin, who was then sixteen years old, was convicted and sentenced to death for a crime he did not commit, ultimately spending more than a year on death row before the Louisiana Supreme Court overturned his conviction. *See State v. Cousin*, 710 So. 2d 1065 (La. 1998).

The decision of the Fifth Circuit that respondents were acting in their "advocatory" role and were thus entitled to absolute immunity squarely conflicts with a decision of the D.C. Circuit, as the Fifth Circuit itself acknowledged. *See* Pet. App. 10a n.6. Moreover, the Fifth Circuit's radical expansion of the definition of advocacy to cover virtually all actions performed by a prosecutor after the existence of probable cause cannot be squared either with the functional and historical analyses mandated by this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and *Kalina v. Fletcher*, 522 U.S. 118 (1997), or with this Court's repeated admonition that lower courts be "quite sparing" in their recognition of absolute immunity, *Buckley*, 509 U.S. at 269. Finally, the Fifth Circuit's decision is emblematic of the confusion among the courts of appeals and the disagreement among commentators about the scope of prosecutorial absolute immunity. Review by this Court is thus urgently needed.

A. Background.

This Court is well aware of the expanding list of citizens exonerated from our Nation's death rows.[1] This case

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[1] See Death Penalty Information, *Innocence: Freed From Death Row*, at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (providing list of names, including Cousin's name at number 78).

involves the efforts of one member of that group – petitioner Shareef Cousin – to obtain justice for his wrongful conviction.

On March 2, 1995, Michael Gerardi and Connie Babin emerged from dinner at the Port of Call Restaurant in the French Quarter of New Orleans sometime shortly after 10:00 p.m. As they walked toward Gerardi's car, which was parked around the corner, Babin noticed three African-American males approaching the car. One confronted Gerardi and shot him in the course of a robbery. The three then fled. Gerardi died shortly thereafter.

Cousin, who was sixteen years old at the time, was arrested on March 24, 1995, and was indicted and tried for capital murder. At trial, no physical evidence was introduced connecting Cousin to the crime or the crime scene. *See Cousin*, 710 So. 2d at 1067. Indeed, a videotape introduced by the defense demonstrated that Cousin was playing in a recreational league basketball game at the time of the murder and thus could not have been involved in the crime.

The most substantial evidence for the State at trial consisted of Babin's purported eyewitness identification of Cousin as the perpetrator, as well as tentative after-the-fact identifications by other witnesses who claimed to have seen three African-American males in the vicinity of the crime on the evening in question.

The prosecution also sought to demonstrate Cousin's guilt through the testimony of James Rowell, a friend of Cousin's who was also sixteen years old. In its opening statement, the prosecution claimed that Rowell would testify that Cousin had bragged to him about robbing and killing a man in the French Quarter. When called to testify, however,

Rowell denied that Cousin had ever made such a statement. *Id.* at 1067-68. Rowell testified instead that he had previously fabricated this testimony because the prosecutor (Jordan) forced him to do so. *Id.* at 1068. The prosecution introduced testimony to "impeach" Rowell's statement, and then relied on that testimony as substantive evidence of Cousin's guilt. The jury subsequently convicted Cousin and sentenced him to death.

The Louisiana Supreme Court reversed. With respect to Babin's purported identification of Cousin, the Court repeatedly chastised prosecutor Jordan for his failure to turn over critical exculpatory material that would have destroyed the reliability of the identification. As the Court explained:

> When questioned on the night of the murder, Babin told the police that she did not get a good look at the gunman and probably would not be able to identify him. Babin further stated, in an interview at her house three days later, that she was not wearing her glasses or contact lens on the night of the murder and could only see patterns and shapes.

Id. at 1066. The defense did not discover this until after Cousin had been convicted of murder. *Id.* at 1066 n.2.

The Louisiana Supreme Court also held that the prosecution's use of the testimony introduced to "impeach" Rowell was fundamentally unfair. Among other things, the court held that the conviction was unlawful because of the "prosecutor's flagrant misuse of that evidence for purposes that the prosecutor himself admitted was an improper use." *Id.* at 1072.

The State thereafter announced its intention to retry Cousin. As the retrial proceedings began (with new defense counsel in place), however, a cascade of revelations of illegal conduct undertaken by the police and prosecution to frame Cousin caused prosecutor Jordan to consent to the defense's motion to recuse Jordan from any further participation in the case, and eventually led the State to dismiss all charges against Cousin.

B. The Pattern of Official Misconduct.

As set forth in the unusually detailed allegations contained in the complaint, Pet. App. 46a-118a, Cousin's arrest and conviction for capital murder were the product of a sustained campaign by respondents and members of the New Orleans Police Department to ensure the conviction of an innocent teenager for capital murder.

It was clear from the outset that Shareef Cousin had no involvement in the murder of Mr. Gerardi. According to police records, Gerardi was murdered at 10:10 p.m. Compl. ¶ 63, Pet. App 61a. On the night of the murder Cousin was playing basketball in a game sponsored by the New Orleans Recreation Department, and the game had not ended at the time the murder took place. *Id.* ¶ 61, Pet. App. 61a. The game was videotaped by the brother of one of the players, and the videotape was turned over to the prosecution. *Id.* ¶ 150, Pet. App. 85a.

Respondents and the New Orleans police nevertheless continued to seek out – and indeed to fabricate – evidence to convict Cousin. Cousin was taken into custody on the basis of a search and arrest warrant that was supported by an affidavit from Officer Anthony Small, one of the defendants below. The affidavit rested principally on a supposed tip provided to the "crimestoppers" hot line. Small, however,

had conspired with a friend to fabricate the "tip" in order to take advantage of a $10,000 reward offered by local merchants for information leading to arrest of the killer. *Id.* ¶¶ 73-78, Pet. App. 64a-65a. Small then relied on this manufactured tip to support a warrant for Cousin's arrest, and he and his friend split the reward money. *Id.* ¶ 77, Pet. App. 65a.

In a similar vein, Small's affidavit purported to rest on photo identifications by Babin and by two other witnesses to the events on the night of the crime. As the Louisiana Supreme Court subsequently found, however, Babin had given the police statements making clear she could not identify the murderer. *Id.* ¶¶ 103-108, Pet. App. 72a-73a. As would later be revealed, the police records made clear that the other supposed identifications were equally suspect. *Id.* ¶¶ 115-123, Pet. App. 76a-78a. The state trial judge presiding over the retrial proceeding concluded that most of the key facts in the affidavit were false, and known to be so, when made.

Moreover, Officer Small fabricated the initial aspects of the case against Cousin notwithstanding the fact that there was another – apparently truthful – "crimestoppers" tip provided to the police that identified the real perpetrators of the Gerardi murder. The tip stated that three persons (Antonio Harper, Derrick Smith, and "Brandon") had committed the killing, and that they drove a red Ford 4-door. *Id.* ¶ 83, Pet. App. 66a. That tip corroborated evidence the police received from a witness to the events surrounding the murder, who saw the killers leave in their car and used his binoculars to identify the car's license plate. That license plate was matched to a red Ford 4-door owned by Christell Baham. *Id.* ¶¶ 84-85, Pet. App. 66a-67a. Ms. Baham, as it turns out, is the mother of Derrick Smith. *Id.* ¶ 86, Pet. App.

67a. When the police went to the house to interview Harper and Smith, the red Ford was parked outside. *Id.* ¶ 87, Pet. App. 68a. None of this information was revealed to the defense. *Id.*

Once Cousin had been taken into custody, the police and prosecutors continued their systematic efforts to manufacture a case against him, suppressing evidence that implicated other suspects, concealing exculpatory facts regarding alleged eyewitness identifications, and attempting to intimidate witnesses favorable to the defense. *See generally id.* ¶¶ 124 - 179, Pet. App. 78a-93a (providing numerous examples of misconduct).

Respondents Berry and Jordan played a critical role in seeking to ensure that the campaign against Cousin initiated by the police officers would succeed. Indeed, as the complaint alleges and as evidence developed in other proceedings demonstrates, Berry and Jordan worked hand-in-hand with their police counterparts to fabricate the case against Cousin, and to secure a conviction notwithstanding their knowledge that the evidence against Cousin was deeply flawed and that Cousin was, in fact, innocent.

As relevant to this petition, the complaint alleges that Berry and Jordan were involved in at least three distinct abuses. First, Berry and Jordan misused their investigative powers in an effort to manufacture false evidence against Cousin, by participating with police officers in the effort to coerce false incriminating testimony from James Rowell.

Second, both before and during trial, Berry and Jordan intervened to prevent witnesses from testifying favorably to Cousin. Prior to trial, respondents used illegal "DA subpoenas" to coerce potential witnesses to speak with them,

in an effort to cast doubt on the timing of the basketball game.[2]

Then, while the trial was ongoing, Berry and Jordan instructed four of these potential witnesses to leave the area of the courtroom where Cousin's case was being tried, and to report to the D.A.'s office for the duration of the trial. Compl. ¶¶ 170-171, 175, Pet. App. 90a-91a. The four witnesses – Romanza Hayes, Michael Doss, Don Mathieu, and James Smith – all would have testified based on personal knowledge that Cousin was playing in the recreational league basketball game that did not end until after 10 p.m., and that Cousin thus could not have been at the scene of the crime when the murder occurred. *Id.* ¶¶ 171-174, Pet. App. 90a-91a. As a result of the detention and sequestration of these potential witnesses, the witnesses were unavailable at trial and did not testify on Cousin's behalf. *Id.* ¶ 170, Pet. App. 90a.[3]

Finally, the prosecution engaged in a thorough and systematic effort to conceal exculpatory evidence that would have precluded any possibility of Cousin's conviction. As the Louisiana Supreme Court noted, Berry and Jordan suppressed evidence that would have fatally undermined

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[2] The prosecutors used so-called "Article 66 subpoenas" to obtain testimony from defense witnesses for use at trial and to intimidate defense witnesses to prevent them from testifying on Cousin's behalf. *See id.* ¶¶ 155-168, Pet. App. 86a-89a. Those subpoenas, which suggested that the prospective witnesses had to report for interviews on pain of contempt, were unlawful because they were issued without the requisite prior judicial approval.

[3] At the hearing on the Motion for a New Trial, Berry and Jordan admitted that they had secreted defense witnesses in the D.A.'s office. *See id.* ¶¶ 171, 175, Pet. App. 90a-91a.

Connie Babin's purported identification of Cousin. But that was the tip of the iceberg. Berry and Jordan had in their files, but did not disclose, documents indicating that the purported identifications that supported Officer Small's affidavit were either unreliable or never took place. *Id.* ¶¶ 101-102, Pet. App. 71a-72a. They also had in their files, but did not disclose, reams of evidence implicating other likely suspects. *See, e.g., id.* ¶¶ 82-99, Pet. App. 66a-71a. And they had in their files, but did not disclose, other evidence establishing that Cousin could not have committed the murder, including some statements supporting Cousin's alibi and other statements from eyewitnesses who specifically excluded Cousin as the perpetrator. *Id.* ¶¶ 117-118, 119, Pet. App. 76a-77a.

C. The District Court Proceedings.

Cousin filed his complaint on January 7, 2000, alleging that his arrest, trial, conviction, and incarceration were based on a pervasive pattern of falsification and abuse and violated numerous provisions of the U.S. Constitution, federal and state statutory law, and the common law.

Defendants Berry and Jordan moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for summary judgment pursuant to Fed. R. Civ. P. 56, asserting that, even if the allegations in the complaint were true, the prosecutors had absolute immunity for all such actions. On June 4, 2001, the district court granted the motion and dismissed all of the claims against Berry and Jordan.[4]

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[4] Cousin's complaint also named as a defendant District Attorney Harry Connick, as well as Officer Small and the other New Orleans police officers involved in the effort to frame Cousin. The district court granted Connick's motion for dismissal on the basis of qualified immunity, and the Fifth Circuit affirmed. The claims against the officers have been

With respect to the allegations that Berry and Jordan had improperly coerced witness testimony, the court held that "[e]ven though plaintiff alleges that defendants coerced or conspired with some of these witnesses to present false evidence at trial . . . the presentation of false evidence to the trial court necessarily implicates an assistant district attorney's prosecutorial function and, accordingly, is shielded by absolute immunity." Pet. App. 28a. In reaching that result, the court did not distinguish between the creation of false evidence on the one hand and the presentation of that evidence at trial on the other.

The district court similarly held that absolute immunity barred Cousin's claim that Berry and Jordan had unlawfully detained important defense alibi witnesses during trial, and thus had deprived Cousin of the ability to present his defense. Using a temporal rather than a functional analysis, the court noted that the detentions "occurred *during* the trial" and held that they were not actionable because Berry and Jordan are "absolutely immune for their actions during the presentation of the State's case." Pet. App. 27a.

Finally, the district court concluded without discussion that respondents were entitled to absolute immunity with respect to Cousin's claims that the prosecution had systematically hidden massive amounts of exculpatory evidence. *Id.*

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stayed in the district court pending resolution of the prosecutors' claim of absolute immunity. The propriety of those actions is not at issue in this petition.

The district court certified its order as final under Fed. R. Civ. P. 54(b), Pet. App. 40a–42a, and Cousin took an immediate appeal.[5]

D. The Fifth Circuit's Decision.

In a published opinion, the Fifth Circuit affirmed, although it disagreed with much of the reasoning of the district court. The Court addressed first the allegations that respondent Jordan had coerced and fabricated the testimony of witness Rowell. Although this Court has repeatedly held that a functional rather than a temporal analysis of immunity is appropriate, the Fifth Circuit held that "the question of absolute immunity turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed and whether the interview related to testimony to be presented at trial." Pet. App. 11a. Because Rowell's own declaration purportedly clarified that, before Rowell and assistant District Attorney Jordan ever met, Rowell "had already talked to the police, [Rowell's lawyer] had already advised him that he 'needed to give up Shareef on the murder,' and Jordan had already talked with [Rowell's lawyer]," *id.* at 12a, the Fifth Circuit concluded that "Jordan was functioning as an advocate when he allegedly instructed Rowell to lie," *id.*

The Fifth Circuit acknowledged that the D.C. Circuit had held in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995), that "absolute immunity is inapplicable with respect to allegations of witness tampering, because such activity is

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[5] Although there was arguably some ambiguity whether the district court's initial order satisfied the requirements of Rule 54(b) when Cousin first filed his appeal, Cousin requested, and the district court issued, an unambiguous Rule 54(b) final judgment *nunc pro tunc*. *See* Pet. App. 40a-42a; *see also id.* at 5a-6a.

directed at 'the collection of information to be used in a prosecution.'" Pet. App. 10a n.6 (quoting *Moore*, 65 F.3d at 194). The Fifth Circuit concluded, however, that *Moore* was "inconsistent" with Fifth Circuit precedent, and that that the D.C. Circuit had adopted "a much narrower conception of the advocacy role than is justified by [Supreme Court precedent]." *Id.*

Turning to the claim that the prosecutors detained defense witnesses, the Fifth Circuit affirmed the district court's remarkable conclusion that detaining – indeed kidnapping – defense witnesses in order to prevent them from testifying is part of a prosecutor's advocacy function. Although purporting to reject the district court's reliance on a temporal rather than a functional analysis, the Fifth Circuit emphasized that the timing of events "can be highly relevant to the inquiry into function." Pet. App. 17a. The Fifth Circuit concluded that the detention of witnesses was "directly related to the trial process, was entered into in the context of an ongoing trial, and was designed to secure a conviction." *Id.* In these circumstances, according to the court of appeals, the detention of witnesses to prevent them from testifying in criminal proceedings "cannot be characterized as anything other than advocatory." *Id.*

Finally, the Fifth Circuit held that absolute immunity was appropriate even for the unconstitutional suppression of massive amounts of exculpatory evidence such as that alleged in Cousin's complaint. The Fifth Circuit noted its concern that "the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings." Pet. App. 15a. The court of appeals viewed the loss of potentially meritorious claims as a "regrettable but necessary cost" of the need to ensure the "vigorous and

fearless performance of the prosecutor's duty." *Id.* (citation and internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

In recent years, this Court has narrowed and sought to clarify the scope of prosecutorial absolute immunity. The Court has emphasized, for example, the need to be "'quite sparing'" in the recognition of "absolute immunity," *Buckley*, 509 U.S. at 269 (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)), reflecting the presumption "that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). The Court has thus limited prosecutorial absolute immunity to actions performed by prosecutors in their "advocatory role," and it has defined the test for advocacy as a functional one that "looks to 'the nature of the function performed, not the identity of the actor who performed it,'" *Buckley*, 509 U.S. at 269 (quoting *Forrester*, 484 U.S. at 224). A prosecutor seeking absolute immunity "bears the burden of showing that such immunity is justified for the function in question," *Buckley*, 509 U.S. at 269 (quoting *Burns*, 500 U.S. at 486), and must show both that the challenged activity falls within a "common-law tradition of absolute immunity for a given function," and that recognition of absolute immunity is not inconsistent with "§ 1983's history or purposes." *Id.*

Notwithstanding this recent jurisprudence, the decisions in the courts of appeals reflect widespread analytic confusion over the proper scope of prosecutorial absolute immunity, prompting substantial criticism by commentators, and – most troubling of all – resulting in an overly expansive definition of advocacy that effectively immunizes the vast majority of prosecutorial conduct.

The Fifth Circuit's decision below is emblematic of this confusion. With barely a nod to this Court's functional analysis and without any analysis of the "common-law tradition," the Fifth Circuit held that local prosecutors were performing an "advocatory function" when they "instructed [a witness] to lie," Pet. App. 12a, when they undertook the "detention of witnesses to prevent them from testifying [for the defense] in criminal proceedings," *id.* at 17a, and when they "suppressed significant exculpatory evidence in violation of *Brady v. Maryland*," *id.* at 14a (citation omitted). The result of the Fifth Circuit's decision is that prosecutors are absolutely immune for virtually all activity that occurs after the existence of probable cause, whether that activity occurs before, at, or during trial.

Review of the decision below is urgently needed. At the outset, the Fifth Circuit's extension of absolute immunity for coercing false testimony conflicts directly with the D.C. Circuit's decision in *Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1995). In *Moore*, the D.C. Circuit held that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory." *Id.* at 194. In reaching the contrary conclusion below, the Fifth Circuit acknowledged the split with *Moore*, but concluded that the D.C. Circuit had adopted "a much narrower conception of the advocacy role" than the Fifth Circuit believed was justified. Pet. App. 10a n.6.

More important, the Fifth Circuit's decision represents a vast expansion of this Court's immunity doctrine. This Court has held that absolute immunity attaches to the function, not the office, so that, for example, "[w]hen the functions of prosecutors and detectives are the same, . . . the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276. In *Buckley*, the Court denied absolute immunity for a prosecutor alleged to have fabricated false evidence,

noting that the prosecutor's actions were no different from those that might be taken by a detective. *Id.* And in *Kalina*, the Court denied absolute immunity to a prosecutor who executed a sworn certification in support of a warrant, noting that the prosecutor "performed an act that any competent witness might have performed." *Kalina*, 522 U.S. at 129-30.

The Fifth Circuit's extension of absolute immunity to the coercion and fabrication of false testimony and the detention of defense witnesses is flatly inconsistent with these precedents. The fabrication and coercion of false testimony is action that could be performed by any police officer and that requires no "exercise of prosecutorial discretion." *Id.* at 125. Under *Buckley* and *Kalina*, that activity is investigative and merits only qualified, not absolute, immunity. As the D.C. Circuit held, "intimidating and coercing witnesses into changing their testimony" is "a misuse of *investigative* techniques" that "relates to a typical police function, the collection of information to be used in a prosecution." *Moore*, 65 F.3d at 194; *see also Milstein v. Cooley*, 257 F.3d 1004, 1011 (9th Cir. 2001) (stating that "acquiring known false statements from a witness for use in a prosecution is likewise fabricating evidence that is unprotected by absolute immunity").

Similarly, because the detention of defense witnesses to prevent them from testifying could be performed by anyone – a police officer, a marshal, or even a member of the public – and requires no special legal skill or training, a prosecutor who engages in such activity is entitled to, at most, qualified immunity under *Buckley* and *Kalina*.

The Fifth Circuit's decision to immunize all of the conduct at issue in the complaint is particularly troubling given this Court's admonition that the grant of absolute immunity is to be "quite sparing." Indeed, the Court has

consistently cabined the scope of absolute immunity for prosecutors, *see, e.g.*, *Kalina*, 522 U.S. at 131; *Buckley*, 509 U.S. at 273-78; *Burns*, 500 U.S. at 496 (no absolute immunity for giving legal advice to police); *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (no absolute immunity for U.S. Attorney General exercising national defense functions), and it has actively resisted efforts to expand absolute immunity more generally, *see, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997) (President not entitled to absolute immunity from civil suit); *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 437 (1993) (court reporter not entitled to absolute immunity); *Forrester v. White*, 484 U.S. 219, 229 (1988) (state judge not entitled to absolute immunity for decision to demote and dismiss probation officer); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (police officer not entitled to absolute immunity for conduct involved in applying for warrant); *Harlow v. Fitzgerald*, 457 U.S. 800, 808-13 (1982) (Presidential aides not entitled to absolute immunity).

Unfortunately, the expansive understanding of immunity reflected in the decision below, although flatly inconsistent with this Court's precedent, is all too common in the courts of appeals. The Fifth Circuit, for example, routinely grants absolute immunity with respect to allegations of prosecutorial misconduct like the ones presented here. *See, e.g.*, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995) (absolute immunity for allegations that prosecutor intimidated witnesses in an effort to suppress their testimony); *Mowbray v. Cameron County*, 274 F.3d 269, 276-77 (5th Cir. 2001) (absolute immunity for allegations that prosecutor "shopped for witnesses" to support baseless theory) *cert. denied*, 535 U.S. 1055 (2002).

Other Circuits as well, with the exception of the D.C. Circuit in the *Moore* decision, have expanded prosecutorial absolute immunity far beyond what this Court's precedents permit. *See, e.g.*, *Hill v. City of New York*, 45 F.3d 653, 662 (2d Cir. 1995) (prosecutor is absolutely immune for allegations of "deliberate fabrication of false evidence" to the extent the fabrication involves out-of-court efforts to control a witness' that "are made subsequent to the decision to indict"); *Carter v. Burch*, 34 F.3d 257, 261-63 (4th Cir. 1994) (absolute prosecutorial immunity is appropriate for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant); *see generally* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity – How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C.L. Rev. 1019, 1019-20 (1996) ("When the United States Supreme Court handed down its opinion in *Buckley v. Fitzsimmons* in June 1993, the decision was heralded as the beginning of the end of absolute prosecutorial immunity. . . . Whatever threat *Buckley* may have posed to the highly deferential doctrine of prosecutorial immunity, however, has not yet materialized.").

The consequences of this confusion among the courts of appeals are severe. First, there is doctrinal incoherence. Despite this Court's emphasis on the importance of the "common-law tradition" in justifying absolute immunity, immunity is routinely extended without any serious historical analysis and when common-law analogues are clearly absent.[6] Similarly, despite the emphasis on the role of absolute immunity in helping the judicial process by giving prosecutors the freedom to bring evidence before the court,

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[6] *See, e.g.*, Pet. App. 9a-14a, 16a-18a (extending absolute immunity for alleged fabrication of evidence and detention of witnesses without identifying any common-law tradition of immunity for these functions).

see, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976), immunity is routinely granted for prosecutors' efforts to suppress evidence or otherwise prevent evidence from getting before the finder of fact.[7] And despite paying lip service to a functional analysis, the lower courts have adopted probable cause as a bright line demarcation – even though all nine Justices *rejected* such a bright line in *Buckley*, *see supra* pages 22-23 – resulting in prosecutors' receiving absolute immunity when officers performing the same function at the same time would not.[8]

Unsurprisingly, academic commentators have decried this state of affaris and called for the Court to revisit the doctrine. *See, e.g.*, Felice F. Guerrieri, Comment, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. Ill. U. L.J. 353, 375 (2001) (arguing that Court should reconsider absolute immunity doctrine in light of the frequency of prosecutorial misconduct); Douglas J. McNamara, Buckley, Imbler *and* Stare Decisis*: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 Alb. L. Rev. 1135, 1195 (1996) (advocating explicit overturning of *Imbler* because, among other flaws, its extension of absolute immunity to withholding of exculpatory evidence is inconsistent with Court's functional and historical approach); Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441, 3457 (1999) (noting that lower courts differ widely in their determinations of whether an action

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[7] *See, e.g.*, Pet. App. 14a-18a (extending absolute immunity for alleged detention of defense witnesses and suppression of exculpatory evidence); *Hill*, 45 F.3d at 662; *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995).

[8] *See, e.g.*, Pet. App. 9a-14a; *Hill*, 45 F.3d at 662.

constitutes advocacy or investigation and suggesting that Supreme Court needs to clarify this line).

But this doctrinal incoherence is not a matter of merely academic concern. The extent of prosecutorial immunity is a recurring and important issue in the federal courts. As a result of the persistent refusal of the courts of appeals to hold prosecutors accountable for their constitutional wrongs, the lower courts have denied victims recovery for even the most egregious prosecutorial misconduct, even when (as alleged in this complaint) the misconduct results in the erroneous and unjustified imposition of the death penalty. Because other constraints on prosecutorial misbehavior are largely ineffective,[9] the absence of a remedy under § 1983 permits prosecutorial misbehavior to continue unchecked, undermining the integrity of the very judicial process that absolute immunity is designed to protect.

Against this backdrop, this petition provides an ideal vehicle for the Court's consideration of these issues. The detailed allegations in the complaint describe a range of prosecutorial misconduct that will allow the Court to undertake a full explication of the proper scope of

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[9] *See* Guerrieri, 25 S. Ill. U. L.J. at 375 (noting low reversal rates for prosecutorial misconduct); McNamara, 59 Alb. L. Rev. at 1195 (noting the neglect of bar associations to discipline unethical prosecutors); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 705, 742 (1987) (arguing that professional sanctions against prosecutors who violate *Brady* are virtually non-existent); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 902 (1997) (arguing that, given absolute immunity, prosecutors have no incentive to turn over exculpatory evidence); Williams, 67 Fordham L. Rev. at 3442 (noting failure of professional disciplinary authorities to discipline prosecutors effectively).

prosecutorial absolute immunity. The decision below squarely confronts the relevant issues, and forthrightly acknowledges a division among the circuits. And the decision below is a particularly egregious example of the lower courts' overly expansive conception of advocacy. Review by this Court is thus appropriate.

I. THE FIFTH CIRCUIT'S EXTENSION OF ABSOLUTE IMMUNITY TO COERCION AND FABRICATION OF FALSE TESTIMONY SQUARELY CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND IS CONTRARY TO THE DECISIONS OF THIS COURT.

In the decision below, the Fifth Circuit held that a local prosecutor "was functioning as an advocate when he allegedly instructed [a witness] to lie." Pet. App. 12a. That decision, although consistent with decisions of the Second and Fourth Circuits, squarely conflicts with a decision of the D.C. Circuit, and is flatly contrary to decisions of this Court.

The conflict between the decision below and the decision of the D.C. Circuit in *Moore* could hardly be starker. Cousin and Moore each maintained that prosecutors had intimidated and coerced witnesses into changing their testimony in an effort to secure a conviction. *See Moore*, 65 F.3d at 191 (noting plaintiff's contention that prosecutor Valder "intimidated and coerced witnesses into changing their testimony to incriminate Moore"); Pet. App. 8a (noting plaintiff's contention that prosecutors Berry and Jordan "coerced and intimidated Rowell so that he would give false trial testimony that would implicate Cousin in the Gerardi murder").

These similarities notwithstanding, the Fifth Circuit and the D.C. Circuit reached diametrically opposite results. The

D.C. Circuit concluded that "intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of *investigative* techniques legitimately directed at exploring whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution." *Moore*, 65 F.3d at 194.

The Fifth Circuit disagreed, holding that because the coercion and fabrication of the Rowell testimony occurred after the existence of probable cause, *see* Pet. App. 13a-14a. (noting that the prosecutors' interview with Rowell "was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause"), the prosecutor was acting as an advocate rather than as an investigator. The Fifth Circuit forthrightly acknowledged that its decision conflicted with that of the D.C. Circuit in *Moore*, but concluded that the D.C. Circuit had adopted "a much narrower conception of the advocacy role" that the Fifth Circuit believed justified. Pet. App. 10a n.6.[10]

The Fifth Circuit's broader "conception of the advocacy role," however, is flatly contrary to the Court's decision in *Buckley*. Under *Buckley*, the advocacy for which prosecutors enjoy absolute immunity includes "the professional

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[10] As noted, the Fifth Circuit's expansive notion of advocatory conduct, while in conflict with the approach of the D.C. Circuit, is consistent with the approach taken in other Circuits, including the Second Circuit and the Fourth Circuit. *See, e.g.*, *Hill*, 45 F.3d at 662 (prosecutors immune for allegations of "deliberate fabrication of false evidence"); *Carter*, 34 F.3d at 261, 263 (absolute prosecutorial immunity for allegation that prosecutor "coached [the witness] not to testify" in a way that would have helped the defendant).

evaluation of the evidence assembled by the police and appropriate preparation of its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 273. It does not, however, include the "fabrication of false evidence," *id.* at 275, which is an investigative, rather than an advocatory, function. As the D.C. Circuit stated, "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory," but is instead "a misuse of *investigative* techniques." *Moore*, 65 F.3d at 194 (emphasis in original); *see also Milstein*, 257 F.3d at 1011 (stating that "acquiring known false statements from a witness for use in a prosecution is likewise fabricating evidence that is unprotected by absolute immunity").

The Fifth Circuit reached a contrary conclusion because it understood *Buckley* to have established a bright line inquiry under which the existence of probable cause immunizes subsequent prosecutorial conduct. The question of absolute immunity, the Fifth Circuit stated, "turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed." Pet. App. 11a; *see also id.* (focusing on "whether Cousin had already been charged or arrested at the time of the events alleged").

But the Fifth Circuit's extraction of such a bright-line rule from *Buckley* was fundamentally misguided. Although the majority in *Buckley* determined that a prosecutor is almost certainly acting in a non-advocatory capacity prior to the existence of probable cause, all nine Justices in *Buckley rejected* the suggestion that the existence of probable cause transforms what would otherwise be investigative activity into advocacy. The majority stated, for example, that even after a determination of probable cause, "a prosecutor may engage in 'police investigative work' that is entitled to only

qualified immunity." *Buckley*, 509 U.S. at 274 n.5. Justice Kennedy's opinion dissenting on that issue similarly stated that "even after there is probable cause to arrest a suspect or after a suspect is indicted, a prosecutor might act to further police investigative work." *Id.* at 290 (Kennedy, J., concurring in part and dissenting in part); *see also Zahrey v. Coffey*, 221 F.3d 342, 347 n.2 (2d Cir. 2000) ("All members of the Court recognized . . . that a prosecutor's conduct even after probable cause exists might be investigative.").

The Fifth Circuit sought to bolster its conclusions by emphasizing that "the interview related to testimony to be presented at trial." Pet. App. 11a. But that analysis misses the point, because it focuses on the role the prosecutor plays when using the testimony, rather than the role played when extracting it. An effort to fabricate testimony by coercing a witness to frame a suspect should not become "advocatory" because that same testimony might be used at trial. Such a rule would create perverse incentives for prosecutors to use fabricated testimony and would result in a marked departure from this Court's approach in *Buckley*. As the Court sensibly explained, "[a] prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276.

History, too, condemns the Fifth Circuit's approach, because the court of appeals failed to demonstrate that inducing witnesses to create false testimony was the type of activity that would have been entitled to absolute immunity when § 1983 was passed. To the contrary, a number of

nineteenth-century courts rejected attempts to extend the traditional immunity of witnesses for their in-court statements to cover those persons responsible for inducing the witnesses to commit perjury. *See* Thomas M. Cooley, *A Treatise on the Law of Torts* 248 n.2 (2d ed. 1888); *see also Rice v. Coolidge*, 121 Mass. 393, 395 (1876) (explaining that although a litigant cannot maintain an action against witnesses for their defamatory, false statements in a prior suit, "it does not follow that she may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely").

In short, logic, history, and precedent demonstrate that coercing and fabricating false testimony is advocatory. Such activity neither evaluates evidence assembled by the police, nor prepares that evidence for presentation at trial. Rather, it creates false evidence to implicate the accused, just as a prosecutor or police officer creates false evidence by conspiring to manufacture a link between a suspect and a bootprint the murderer left at the crime scene. *See Buckley*, 509 U.S. at 273. As *Buckley* makes clear, neither a prosecutor nor a police officer would receive absolute immunity for creating such evidence prior to probable cause, and the police officer would plainly not receive absolute immunity even after probable cause. *See id.* at 276 n.6; *see also Pierson v. Ray*, 386 U.S. 547, 555 (1967) (noting that "[t]he common law has never granted police officers an absolute and unqualified immunity"). The treatment of the prosecutor after the existence of probable cause should be no different. *See Buckley*, 509 U.S. at 273 ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, 'it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973))).

II. THE FIFTH CIRCUIT'S RADICAL EXTENSION OF ABSOLUTE IMMUNITY TO COVER THE UNLAWFUL DETENTION OF DEFENSE WITNESSES TO PREVENT THEM FROM TESTIFYING IS FLATLY INCONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court should also grant review of the Fifth Circuit's extraordinary ruling that a prosecutor's "unlawful and improper" detention of witnesses during trial to prevent them from testifying on Cousin's behalf is protected by absolute immunity. The Fifth Circuit determined that such detention "cannot be characterized as anything other than advocatory." Pet. App. 17a. That determination is a radical expansion of this Court's precedents.

Under any reasonable reading of this Court's immunity decisions, the conduct alleged here – telling defense witnesses where to go and determining how long they will wait there – is far from advocatory. Detaining defense witnesses requires no special legal skill or training. A police officer or even a bystander could just have easily directed traffic in the courthouse. Because police officers would not have absolute immunity for such detention, *see, e.g., Briscoe v. LaHue*, 460 U.S. 325, 342 (1983), the prosecutors should not receive absolute immunity for the same actions. *See Buckley*, 509 U.S. at 276 ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

This Court's opinions make clear that prosecutors should receive absolute immunity only for activities that must be peformed by lawyers. In *Kalina*, for example, the Court asked whether the prosecutor was acting as a lawyer when

she made false statements to support her application for an arrest warrant. *Kalina*, 522 U.S. at 129. Because "[t]estifying about facts is the function of the witness, not of the lawyer," *id.* at 130, this Court held that the prosecutor's actions were not advocatory, even though they were part of a longer term project to secure a conviction. The Fifth Circuit's approach, then, cannot be squared with this Court's limitation of prosecutorial absolute immunity to that narrow category of activity that can be performed only by lawyers. *See id.*

Furthermore, the Fifth Circuit made no effort to situate its newly-minted immunity in an established "common-law tradition," as this Court's precedents require. *See, e.g.*, *Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 281 (Scalia, J., concurring). Given that the burden of justifying that immunity rests with the defending official, *id.* at 269; *Burns*, 500 U.S. at 486, the Fifth Circuit's failure to identify an applicable common-law tradition precludes a finding of absolute immunity.

Moreover, a historical analysis confirms that absolute immunity is inappropriate here. Nineteenth-century common law recognized the "distinction between ministerial and judicial duties, and the complete immunity secured in the discharge of the latter class, and the liability incurred in the former." *Nash v. People*, 36 N.Y. 607, 617 (1867). Given the absence of absolute immunity for the performance of "ministerial" duties, prosecutors would plainly not have enjoyed absolute immunity for the essentially "administrative" act of detaining defense witnesses, an activity that requires not the slightest bit of legal skill or training. *Cf. Forrester*, 484 U.S. at 229 (holding that state judge was not entitled to absolute immunity for demoting and firing probation officer).

Providing absolute immunity for detention of defense witnesses to prevent them from testifying is contrary also to the purposes behind that immunity. Prosecutorial absolute immunity exists principally so that prosecutors will not be afraid to introduce evidence in court. "If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Imbler*, 424 U.S. at 426; *Briscoe*, 460 U.S. at 335 (quoting Justice White's concurrence in *Imbler*). But it would be perverse to apply this immunity rule to actions of a prosecutor who is alleged to have intentionally *deprived* the court of relevant information. *See generally Imbler*, 424 U.S. at 442-43 (White, J., concurring in the judgment). Such immunity "would discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors [absolute] immunity." *Id.*

The Fifth Circuit concluded nevertheless that the detention of witnesses was advocatory because the prosecutors' conduct "was directly related to the trial process, was entered into in the context of an ongoing trial, and was designed to secure a conviction." Pet. App. 17a. But the Fifth Circuit focused predominantly on the timing of events. In the Fifth Circuit's view, because the conduct occurred during an "ongoing trial," it must be advocatory and shielded by absolute immunity. *Id.* at 16a-17a. That is simply the wrong analytic approach.

Moreover, the Fifth Circuit's approach is hopelessly at odds with this Court's admonition that absolute immunity is to be applied sparingly. To be certain, detaining witnesses aids the prosecutor's trial effort. But murdering the defendant's witnesses would similarly help the prosecutor's chances at trial, and yet surely such action does not

constitute advocacy. To define "advocacy" to include any action by a prosecutor that occurs during trial and increases the chances of conviction is to read the term so broadly as to deprive it of any meaning. This Court, by distinguishing between advocatory, investigative, and administrative prosecutorial action, has sought to confine absolute immunity to the initiation of a prosecution and to the evaluation, preparation, and presentation of evidence already assembled by police. *Buckley*, 509 U.S. at 273; *see also Imbler*, 424 U.S. at 431 n.33. The Fifth Circuit's approach here cannot be squared with that precedent.

III. THE GRANT OF ABSOLUTE IMMUNITY FOR THE UNCONSTITUTIONAL SUPPRESSION OF EXCULPATORY EVIDENCE HAS NO HISTORICAL ANTECEDENT AND IS CONTRARY TO THE PURPOSES OF THE IMMUNITY DOCTRINE.

Finally, the Court should grant review of the Fifth Circuit's ruling that absolute immunity protects prosecutors who unconstitutionally withhold substantial exculpatory evidence from the defense. It is true that this Court stated in a footnote in *Imbler* that absolute immunity extends to the deliberate suppression of exculpatory evidence, 424 U.S. at 430 n.34, and the courts of appeals have generally adopted the *Imbler* dicta as law. Nevertheless, this Court should take this opportunity to revisit the Court's cursory analysis in *Imbler* for at least three reasons.

First, the approach in *Imbler* is inconsistent with the analytical framework set forth in this Court's subsequent cases. As noted above, this Court's more recent precedents establish that a common-law tradition of immunity for the particular function at issue is a necessary, although not sufficient, condition for absolute immunity under § 1983.

See Buckley, 509 U.S. at 269; *Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment). The Court in *Imbler* cited no such common-law tradition with regard to the suppression of evidence and, as Justice White made clear in his concurrence, no such tradition exists. *See, e.g., Imbler*, 424 U.S. at 441 (White, J., concurring in the judgment). The absence of historical roots precludes a finding of absolute immunity.

Second, as noted above, the principal justification for prosecutorial absolute immunity is to give prosecutors the freedom to present witnesses and evidence at trial without the fear of later being sued. *See, e.g., Imbler*, 424 U.S. at 426; *id.* at 442 (White, J., concurring in the judgment) (noting that the "single justification" of absolute prosecutorial immunity was to "encourage [prosecutors] to bring information to the court which will resolve the criminal case"). As Justice White observed, however, it would "stand this immunity rule on its head . . . to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court." *Id.* at 442-43; *see also supra* page 27.

Finally, denial of absolute immunity is appropriate because a § 1983 suit, rather than use of the judicial process, is the principal way to prevent or correct an unconstitutional suppression of evidence. As Justice White observed in *Imbler*, the "judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damages actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface." *Imbler*, 424 U.S. at 443-44 (White, J., concurring in the judgment). Although criminal liability and professional sanctions exist as

theoretical constraints on prosecutorial behavior, *see, e.g., Burns*, 500 U.S. at 486, in practice these tools are very rarely used. *See, e.g., supra* note 9. Denying prosecutors absolute immunity for egregious violations like the ones here provides prosecutors with proper incentives for compliance with constitutional requirements, while preserving the immunities necessary to permit the proper functioning of the judicial process.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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